

# STEP 4 Packet

## Energy Performance Contract *With Negotiating Tips*

February 2003



## Energy Services Coalition

**The Energy Services Coalition (ESC)** is a national nonprofit organization composed of a network of experts from a wide range of organizations working together at the state and local level to increase energy efficiency and building upgrades through energy savings performance contracting.

Energy savings performance contracting enables building owners to use future energy savings to pay for up-front costs of energy-saving projects, eliminating the need to dip into capital budgets.

[www.escperform.org](http://www.escperform.org)

608-255-0988

# Energy Performance Contract

## ***OVERVIEW:***

This Energy Performance Contract is for design, construction, guarantee, and follow-up monitoring of energy-saving projects. An energy audit was previously completed that identified the costs and savings of each project. The audit provides the basis to develop and negotiate this Energy Performance Contract.

- Colorado's documents and process were developed from a variety of materials in use for performance contracting a decade ago. Since then, Colorado's revisions and evolving process have become the basis for documents reviewed and endorsed by the Energy Services Coalition (ESC).

## ***NOTES TO CUSTOMERS:***

- Contact the Energy Services Coalition (ESC) for an updated document when you are ready to begin negotiations, as changes or improvements are made regularly, or download it from the web site at: <http://www.escperform.org/documents/4-Contract.doc> (or, [www.escperform.org](http://www.escperform.org), click on "Documents" and see "Performance Contracting Procurement Contracting Documents" section. Download "Step 4: Model Energy Performance Contract." If you have difficulties, contact Michael Arny, ESC Executive Director, at 608-255-0988.
- These performance contracting documents are based on materials and processes used over the past decade by a variety of states, and as further developed for use in Colorado. Information specific to Colorado is highlighted so you can easily identify changes to make for your application.
- This contract is provided as a sample and reference only. It may not identify or address all the circumstances or conditions you may encounter. Consequently, we recommend that your legal counsel and procurement staff carefully review this document and adapt it to meet your needs.
- Colorado customers: Contact Rebuild Colorado, Linda Smith, Governor's Office of Energy Management & Conservation, 303-894-2383 x 203, or [www.colorado.gov/rebuildco](http://www.colorado.gov/rebuildco).

<MODEL >

**ENERGY PERFORMANCE CONTRACT**  
*With Negotiating Tips*

This Purchase Agreement for Energy Conservation Equipment (the "Agreement" or "Contract") is made and entered into as of this day of <date>, by and between <name of customer, state "Board of" if applicable; State agencies include "a department of the State of Colorado"> ("Customer") and <name of energy service company (ESCO)> ("ESCO"), a <name of state where headquarters is located> company doing business in Colorado, for the purpose of the sale and installation of certain energy saving equipment ("Equipment"), described in **Schedule A (Equipment to Be Installed by ESCO)** and provision of other services described in **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)** designed to save energy and reduce related costs for certain property and buildings owned by Customer (the "Premises") as described in **Schedule B (Description of the Premises)**.

**WITNESSETH**

**WHEREAS**, ESCO has developed or become knowledgeable about certain procedures for controlling energy and water consumption through the use of engineering analyses and devices installed and maintained on the premises of its customers; and

**WHEREAS**, ESCO has made an assessment of the energy consumption characteristics of the Premises, which Customer has approved; and

**WHEREAS**, Customer owns and operates the Premises, and is in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Premises; and

**WHEREAS**, Customer desires to retain ESCO to sell to it, install and service certain energy and water efficiency equipment of the type or class described in **Schedule A (Equipment to be Installed by ESCO)** and to provide other services for the purpose of achieving energy cost reductions within Premises, as more fully set forth herein; and

**WHEREAS**, ESCO has selected the Equipment on the basis of competitive quality, compliance with ESCO's specifications, and price; and

**WHEREAS**, Customer is authorized under the Constitution of the laws of the **State of Colorado** to enter into this Contract for the purposes set forth herein;

**WHEREAS**, required approval, clearance, and coordination has been accomplished from and with appropriate agencies;

**NOW, THEREFORE**, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Customer and ESCO hereto covenant and agree as follows:

### SECTION 1: PURCHASE AND SALE

Customer agrees to purchase and ESCO agrees to provide the Equipment, together with installation, maintenance and other services as provided herein, on the terms and conditions of this Agreement. ESCO is providing this equipment through a third party financier as provided for in a separate lease document.

The agreed to Contract Sum for the Work is \$ **<Cost>**. The Contract Sum will be equal to the sum of all materials, labor, auditing, design, engineering, project management fees, and outside services. ESCO will provide the work identified on **Schedule A (Equipment to be Installed by ESCO)**, and the services detailed on **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)**. ESCO shall supervise and direct the Work and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Agreement. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

### SECTION 2. ENERGY MANAGEMENT PLAN

**SECTION 2.1. Plan Details.** ESCO has prepared a complete Technical Energy Audit, dated **<date>** which has been approved and accepted by Customer as set forth in **Exhibit III (i) (Certificate of Acceptance – Technical Energy Audit)**.

*<Section Overview & Comments: The Technical Energy Audit and Project Development Agreement must be completed before executing this Energy Performance Contract. This section records the Customer's approval and acceptance of the Technical Energy Audit and Project Development Agreement. A Certificate of Acceptance of the Technical Energy Audit should be signed by both parties and attached to the contract. If the list of recommendations is not completely finalized prior to signing this contract, include language to that effect.>*

**SECTION 2.2. Schedules, Exhibits and Appendices.** This Agreement incorporates and makes a part hereof certain Schedules and Exhibits listed in **Section 40 (Schedules and Exhibits)** of this Agreement which determines the precedence of the Schedules and Exhibits relative to each other and to this Agreement in the event of conflict. Notwithstanding, the provisions of this Agreement and the attached Schedules shall govern in the event of any inconsistencies between the Technical Energy Audit and the provisions of this Agreement.

*<Section Overview & Comments: The contract schedules detail the substantive technical parameters of the projects. These schedules are referenced throughout the Contract. If any schedules need to be completed after contract execution, include language to that effect.>*

*<Note to Customer: For Schedule N: General Conditions – If this schedule is desired, specify your own General Conditions and the articles and paragraphs apply to this contract or refer to the State of Colorado's General Conditions for information.>*

*<Note to Customer: Descriptions for each schedule, exhibit and appendix are provided at the end of this sample contract in **Section 40 (Schedules and Exhibits)**.>*

**SECTION 2.3. Other Documents.** This Contract incorporates herein and makes a part hereof the General Conditions set forth in **Schedule N (General Conditions)** and Special Provisions as set forth in **Section 38 (Special Provisions)**, as well as the entire RFP and ESCO Proposal for this Project labeled Appendix A (RFP for ESCO Solicitation) and Appendix B (ESCO Proposal) respectively. Acceptance by the Customer of the Technical Energy Audit is reflected in Exhibit III (i) (Certificate of Acceptance—Technical Energy Audit). Notwithstanding, the provisions of this Contract and the attached Schedules shall govern in the event of any inconsistencies between the Technical Energy Audit and the provisions of this Contract.

*<Section Overview & Comments: This section makes the original Request for Proposals (RFP) a part of the contract. It also acknowledges completion of the ESCO's technical energy audit and its approval and acceptance by the Customer. The original technical energy audit should be attached in its entirety or referenced. If there is any future discrepancy between the audit and any technical schedule(s), the terms of this contract apply.>*

### SECTION 3. ENERGY USAGE RECORDS AND DATA

Customer has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Agreement to ESCO, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Premises.

*<Section Overview & Comments: This section ensures that the ESCO has access to data on historical energy use, facility operations and occupancy in order to develop baseline utility consumption. At a minimum, there should be 24 months of data, however, 36 months is recommended. Existing facility conditions, operations and equipment need to be carefully documented to establish an accurate baseline. This will serve as a record of the state of your buildings before project installation and will be critical in establishing and adjusting the baseline and measurement of savings. Any prior technical studies and energy audits should also be provided for the ESCO's review.>*

### SECTION 4. TIME FOR COMPLETION; COMMENCEMENT DATE; TERM OF AGREEMENT

**SECTION 4.1. Construction Commencement Date and Time for Completion of Work.** Work must commence within thirty (30) days of execution of this Contract and shall be completed as set forth in **Schedule G (Construction and Installation Schedule)**. The Time for Completion of Work is of the essence of this Contract. By executing this Contract, the parties hereto confirm the Time of Completion of Work is a reasonable period for performing the Work. If ESCO is delayed at any time in progress of the Work by an act or neglect of Customer or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond ESCO control, then the Time for Completion of the Work shall be extended by Change Order, for such reasonable time as the parties hereto may determine.

**SECTION 4.2. Performance Commencement Date.** The Performance Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Customer, and when ESCO shall have delivered a Notice to Customer that it has installed and commenced operating all of the Equipment specified in **Schedule A (Equipment to be Installed by ESCO)** and in accordance with the provisions of **Section 13 (Construction Schedule and Equipment Installation; Approval)** and **Schedule H (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**, and Customer has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**. Notwithstanding anything in **Section 4 (Time for Completion; Performance Commencement Date; Term of Agreement)** and **Section 5 (Payments)** to the contrary, the Performance Commencement Date shall not occur and the Customer shall not be required to accept the work under this Agreement unless and until: (i) all Equipment installation for the subject Premises is completed by ESCO in accordance with the terms and conditions of this Agreement, including without limitation the satisfaction of all claims for labor and materials. Customer shall have thirty (30) days after notification by the ESCO to inspect and accept the Equipment. The Customer reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Agreement. Acceptance shall occur at the later of the time specified herein for acceptance or at the expiration of the ten (10) days statutory notice of “final settlement” to subcontractors and other persons furnishing labor, materials, and other supplies in the performance of work. In the event claims are received, acceptance shall not occur until after the receipt by Customer of a signed receipt in full or an order of withdrawal of said claims.

*<Section Overview & Comments: This section determines the Performance Commencement Date when the savings guarantee period begins. This date is usually the first month AFTER the ESCO has completed construction and delivered a notice that all equipment is installed and operating, and the Customer has signed the Certificate of Acceptance. The Certificate of Acceptance should be attached to the contract. No payment for ESCO service and maintenance should be made prior to the Performance Commencement Date. The repayment obligation for project financing should be arranged to coincide with the Performance Commencement Date. The Performance Commencement Date may also need to accommodate the Customer's fiscal year for the purpose of appropriations and budgeting.>*

**<Customer Name>**

**SECTION 4.3. Performance Term of Agreement.** Unless otherwise terminated pursuant to the terms of this Agreement, the Performance Term of this Agreement shall begin with the Performance Commencement Date and continue for *<number of years – 12 years recommended>* years or for a maximum of *<number of years – 25 years recommended>* years if the cost-weighted average lifetime of the equipment exceeds the financing term. This Agreement shall be effective and binding upon the parties immediately upon its execution. The period from contract execution until the Performance Commencement Date shall be known as the "Interim Period". All Energy and Cost Savings achieved during the interim period will be fully credited to Customer and shall not be considered as Energy and Cost Savings provided under the ESCO Energy and Cost Savings Guarantee.

*<Section Overview & Comments: Prior to the Performance Commencement Date the final contract and schedules are negotiated and executed by signature. At that time the ESCO typically begins final project design and construction. The "Interim Period" is the design and construction period. Some savings will be realized during this period. The savings should be credited to the Customer unless specific procedures for verifying these savings are provided and agreed to with the ESCO.>*

## SECTION 5. PAYMENTS

**SECTION 5.1 ESCO Compensation and Fees.** Customer shall pay ESCO the Contract Sum in accordance with **Schedule O ( Payment Schedule and Schedule of Values)**. Payments will be made on a progress payment basis for work completed and accepted by the Customer. A retainage of 10% will be withheld from each payment until the Work is complete and Customer executes the Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**.

*<Section Overview & Comments: If the Customer is using a third-party lease financing structure the ESCO will receive 100% of the Contract Sum from the Customer once the Certificate of Acceptance is signed. The payments to the ESCO during the Interim Period can be drawn down by the ESCO from the proceeds of the lease through an Escrow account set up by the leasing company. The Customer should require a retainage be withheld from the ESCO until the Certificate of acceptance is executed at which time final payment can be made. If the ESCO is financing the project this Section 5.1 should be modified such that the ESCO Compensation and Fees will be based on the actual verified energy savings over the Performance Term.>*

**SECTION 5.2 ESCO Monitoring Fees.** Throughout the Term of this Agreement, or until the ESCO Monitoring, Maintenance and Service Agreement is cancelled by Customer, Customer shall pay the ESCO an annual fee according to **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)** for monitoring the Energy and Cost Savings. Annual guaranteed Energy and Cost savings achieved shall be sufficient to cover any and all fees to be paid to ESCO for the provisions of **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)**.

**SECTION 5.3 Energy and Cost Savings Guarantee.** Subsequent to the Performance Commencement Date and throughout the Term of this Agreement, ESCO hereby guarantees the level



of Annual Energy and Cost Savings as detailed in **Schedule C (Energy and Cost Savings Guarantee)** *<Note: include option to forfeit guarantee and reduce associated cost>*. The guarantee shall remain in effect for at least the first three years of the performance period. The guarantee shall be optional for Customer each year hereafter, however the annual cost savings will meet or exceed the annual payments by the Customer to lease the Equipment each year for the duration of the contract term.

This guarantee is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Agreement as specified in **Schedule D (ESCO's Monitoring, Maintenance and Service Agreement)** and in accordance with the Savings Calculation Formula as set forth in **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)**. This Energy and Cost Savings Guarantee is subject to the satisfactory performance by Customer of all its obligations under this Agreement including, without limitation, adjustment in accordance with **Section 19 (Material Changes)** hereunder. In the event this Agreement is terminated due to an uncured Event of Default by Customer, this Energy and Cost Savings Guarantee shall be cancelled.

ESCO has structured the Energy and Cost Savings Guarantee to be sufficient to exceed any and all annual payments required by the Customer in connection with the acquisition of Equipment to be installed by ESCO under this Contract and the Customer's lease financing obligations. Actual energy and operations savings achieved by ESCO through the operation of Equipment and performance of services by ESCO shall be sufficient to cover any and all annual fees to be paid by Customer to ESCO for the provision of services as set forth and in accordance with the provisions of **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)** and **Schedule O (Annual Installment Payment Schedule)**.

*<Section Overview & Comments: This section establishes the term of the energy and cost savings guarantee to be on an annual basis and to cover any and all annual payments (debt service and ESCO monitoring, maintenance and other fees) to be made by the Customer. It ensures that the ESCO's savings guarantee will at least cover annual project financing costs (principal and interest) and all annual ESCO service fees for maintenance.>*

**SECTION 5.4. Annual Review and Reimbursement/Reconciliation.** Energy-related cost savings shall be measured and/or calculated as specified in **Schedule E (Baseline Energy Consumption)** and **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)** and a report provided within forty-five (45) days of each anniversary of the Performance Commencement Date. ESCO has developed the measurement and verification procedures specified in **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)** to comply with the requirements of the International Performance Measurement and Verification Protocol 2000.

In the event the Energy and Cost Savings achieved during such twelve-month period is less than the Guaranteed Energy and Cost Savings during the years the guarantee is in effect, ESCO shall pay the Customer an amount equal to the deficiency.



If during any twelve-month period the Energy and Cost Savings achieved are greater than the Guaranteed Energy and Cost Savings, such excess Cost Savings shall be retained by the Customer.

*<Section Overview & Comments: At the end of each contract year, usually within a specified 45-60 days, there will be a review and reconciliation of the actual achieved savings (subject to any adjustments made for weather, occupancy, operations etc.) vs. the ESCO's guaranteed savings projections. If there is a savings shortfall, the ESCO is contractually liable to reimburse the Customer for the difference between what was actually achieved and the guaranteed amount. If in any year, the achieved savings exceed the guarantee, the Customer shall retain excess savings. As an incentive for the ESCO to look even deeper for additional savings, a shared savings arrangement could be part of this agreement.>*

**SECTION 5.5. Allowable Payment Sources.** Customer has pre-determined allowable payment sources to be applied to annual payments, as follows:

Customer will allow the following:

Energy and water cost savings

Customer material/commodity savings (cost savings from replacement lamps, ballasts, etc.), including scheduled replacement of parts

Outside labor cost savings, including maintenance contracts.

Customer will negotiate the following:

Customer equity cash outlay

Customer deferred maintenance cost

Offset of future customer capital cost *<Note to Customer: Ensure that this is only credited as a cash infusion, and not again credited as a savings.>*

Customer in-house labor costs *<Note to Customer: These savings are usually not allowable unless staff will be terminated resulting in actual budget savings.>*

Customer will not allow the following: *<Note to Customer: Move any items from "negotiate" to this section if disallowed; otherwise delete this line.>*

Any cost savings related to maintenance and operation of the facilities will be rigorously reviewed and, if agreed to, will be limited to those that can be thoroughly documented and approved by Customer.

**SECTION 5.6. Capital Contribution from Customer.** Customer elects to contribute \$ *<Insert dollar amount>* to pay for part of the initial cost.

**SECTION 5.7. Monitoring Information Procedure.** Energy and Cost Savings shall be calculated each *<period of time – month, quarter or year (not to be paid in advance)>* in the following manner:

- (i) By the *<number of days -- 30<sup>th</sup>>* day after receipt, Customer shall provide ESCO with copies of all energy bills for the Premises that it shall have received for the preceding month;
- (ii) Upon receipt of the required information, ESCO shall calculate the savings in accordance with the agreed-upon calculation formulae in **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline).**

*<Section Overview & Comments: This section can be negotiated and structured to suit the needs of the Customer. It is important to provide the ESCO with monthly utility bills in a timely manner.>*

**SECTION 5.8. Late Payment.** Payment due either party hereunder shall be due and payable within thirty (30) days of the invoice date. Interest shall accrue on any past due balance owed to either party hereunder at the rate of one percent (1%) per month (or the highest rate not prohibited by law, whichever is lower). This remedy shall be in addition to, and not exclusive of, any other remedy available under this Agreement or applicable law.

*<Section Overview & Comments: This section can be negotiated and structured to suit the needs of the Customer. The project's billing schedule for on-going ESCO services can be set up on a monthly or quarterly basis.>*

**SECTION 5.9. Effective Date of Payment Obligation.** Notwithstanding the above provisions in **Section 4**, Customer shall not be required to begin any payments to ESCO under this Contract unless and until all equipment installation is completed by ESCO in accordance with the provisions of **Section 10 (Acceptance Testing)**, **Section 13 (Construction and Installation by ESCO)** and **Schedule H (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**, and accepted by Customer as evidenced by the signed Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**, and unless and until said equipment is fully and properly functioning.

*<Section Overview & Comments: This section states that the final ESCO payments shall not be paid until all equipment is installed and operating in accordance with the agreed upon Construction Schedule and until Customer has accepted the completed installation and signed the required Certificate of Acceptance—Installed Equipment.>*

## SECTION 6. MODIFICATION OF EQUIPMENT

During the Term of this Agreement, Customer will not, without the prior written consent of ESCO, affix or install any accessory equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without ESCO's prior written approval, which shall not be unreasonably withheld.

## SECTION 7. UPGRADING OR ALTERING THE EQUIPMENT

ESCO shall at all times have the right, subject to Customer's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the equipment or implement other energy saving actions in the Premises, provided that:

- (i) the ESCO complies with the standards of comfort and services set forth in **Schedule I: Standards of Comfort** herein;
- (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the Energy and Cost Savings at the Premises and;
- (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Customer for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall be new and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. The ESCO shall update any and all software to be used in connection with the Equipment in accordance with the provisions of **Section 15.1 (Ownership of Certain Proprietary Rights) of Schedule J (ESCO's Maintenance Responsibilities)**. All replacements of and alterations or additions to the Equipment shall become part the Equipment described in **Schedule A (Equipment to be Installed by ESCO)** and shall be covered by the provisions and terms of **Section 10 (Acceptance Testing)** and **Section 13 (Construction and Installation by ESCO)**.

*<Section Overview & Comments: This section describes the terms and conditions under which the ESCO can make changes to the equipment, operating procedures or take other energy savings actions. If such changes are implemented during any time during the contract they must be described in a supplemental schedule and be approved by the Customer. Any equipment replaced is required to be new and have the potential to produce equal or greater savings. If computer software is updated, the licensing provisions of Section 15.1 still apply.>*

### SECTION 8. UTILITY AWARD PAYMENTS

ESCO has entered into a Demand Side Management Agreement *<replace with name of program>* with *<utility company name>* the "Utility") wherein a portion of the Contract Sum will be subsidized by the Utility (the "Award Payment") upon the Utility's inspection and approval of the work performed. Based upon the reduced energy consumption to be achieved at the Premises and the energy efficiency Equipment to be installed, the total Award Payment is estimated to be *\$<insert dollar amount of utility award payment>*. This amount has been applied by ESCO in determining the Contract Sum. There shall be no adjustment to the Contract Sum, Guarantee, or Schedule of Values if the Award Payment allowed by the Utility is other than the amount specified herein, unless the disallowance or reduction is attributable to delay caused by neglect or an act of Customer constituting a breach of its obligations under this Agreement.

Customer understands that ESCO is not a representative or an agent of the Utility.

*<Section Overview & Comments: If utility award payments are NOT available, delete the text and replace with “Utility Award Payments are not available and are not part of this contract.”>*

### SECTION 9. ENVIRONMENTAL REQUIREMENTS

**SECTION 9.1. Excluded Material and Activities.** Customer recognizes that in connection with the installation and/or service or maintenance of Equipment at Customer’s Premises, ESCO may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or (ii) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively “Hazardous Materials”), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as “Excluded Materials and Activities”. Customer agrees that if performance of work involves any Excluded Materials and Activities, Customer will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefor. In the event ESCO discovers Hazardous or Excluded Materials, ESCO shall immediately cease work, remove all ESCO personnel or subcontractors from the site, and notify the Customer. The Customer shall be responsible to handle such Materials at its expense. ESCO shall undertake no further work on the Premises except as authorized by the Customer in writing. Notwithstanding anything in this Agreement to the contrary, any such event of discovery or remediation by the Customer shall not constitute a default by the Customer. In the event of such stoppage of work by ESCO, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage.

ESCO shall be responsible for any hazardous or other materials, including, without limitation, those listed in this **Section 9.1 (Excluded Material and Activities)** that it may bring to the Premises.

#### **SECTION 9.2. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps.**

ESCO has entered into an agreement with an approved PCB ballast disposal ESCO who will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, recycling, and incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Customer’s PCB ballasts will be incinerated in a federally approved facility. Certificate of Destruction will be provided to Customer. ESCO’s responsibility shall be for the proper and legal management of any PCB ballasts generated as a result of the installation of the Equipment only until they are loaded onto an approved PCB ballast disposal ESCO’s vehicle for transportation.

ESCO has entered into an agreement with an approved lamp disposal contractor who will provide approved containers, materials required to label, transportation, recycling in accordance with EPA requirements, and a copy of the manifest.

Customer agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Premises.

### SECTION 10. ACCEPTANCE TESTING

**SECTION 10.1. Modification of Schedules.** To ensure this Agreement and its Schedules properly account for as-installed conditions, which conditions may vary from the pre-installation analyses, the ESCO shall re-validate or modify the Schedules.

**SECTION 10.2. Systems Startup and Equipment Commissioning.** The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in **Schedule H (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)** and prior to acceptance of the project by Customer as specified in **Exhibit III (ii) (Acceptance Testing)**. Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Agreement, and to determine if all building systems, subsystems or components are functioning properly within the new integrated environment. The ESCO shall provide notice to the Customer of the scheduled test(s) and the Customer and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in Equipment operations that may be observed during system testing procedures. Prior to Customer acceptance ESCO shall also provide Customer with satisfactory documentary evidence that the Equipment installed is the Equipment specified in **Schedule A (Equipment to Be Installed by ESCO)**.

*<Section Overview & Comments: This section requires the ESCO to do commissioning to ensure the system is functioning properly, testing equipment performance and verifying the specified operating parameters. Commissioning typically occurs before the Customer's final project acceptance, however, language can be included here to provide for testing after project acceptance. It also requires the ESCO notify the Customer when testing will take place and gives the Customer (or its designee) the right to be present during all tests. Have the commissioning report include manufacturer's startup and performance sheets.>*

### SECTION 11. EQUIPMENT WARRANTIES

ESCO warrants that all equipment sold and installed, as part of this Agreement is new, will be free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of the Certificate of Acceptance (Exhibit III, ii) for the particular energy conservation measure. After the warranty period, ESCO shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)**.



ESCO further agrees to assign to Customer all manufacturer's warranties relating to the Equipment and to deliver such written warranties and which shall be attached and set forth as **Exhibit V (Equipment Warranties)**; to pursue rights and remedies against manufacturer and ESCO of the equipment under the warranties in the event of equipment malfunction or improper or defective function, and defects in parts, workmanship and performance, to notify the Customer whenever defects in equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. The cost of any risk of damage or damage to the equipment and its performance, including damage to property and equipment of the Customer or the Premises, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties shall be transferable and extend to the Customer. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction.

Notwithstanding the above, nothing in this Section shall be construed to alleviate/relieve the ESCO from complying with its obligations to perform under all terms and conditions of this Contract and as set forth in all attached Schedules.

*<Section Overview & Comments: This warranty provision ensures all installed equipment is new and protected by appropriate written manufacturers warranties for parts and performance for a minimum of one year. It requires that warranties provide for replacement with new parts (not used or reconditioned) during the warranty period. While equipment warranties will be transferred to the Customer after completed project installation, the ESCO is responsible for pursuing any necessary remedies during the warranty period. If the ESCO fails to exercise the warranty and damages occur, the ESCO is responsible for all costs of repair and any lost savings. Manufacturer warranties cannot supersede Performance Commencement Date.>*

## SECTION 12. PERMITS AND APPROVALS; COORDINATION

**SECTION 12.1. Permits and Approvals.** All required permits and licenses for the installation of the Equipment, including without limitation, this State's plumbing and electrical permits, shall be secured and paid for by the ESCO. Customer shall use its best efforts to assist ESCO in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Customer, however, be responsible for payment of any permit or license fees. The equipment and the operation of the equipment by ESCO shall upon acceptance conform to all federal, state and local code requirements. ESCO shall furnish copies of each permit or license which is required to perform the work to the Customer before the ESCO commences the portion of the work requiring such permit or license.

As directed by Customer, design documentation will be submitted to Customer for review. As deemed necessary by Customer, design documentation will be forwarded by Customer to the appropriate code review contractor. Customer agrees that the total review process will not be longer than 10 days. All costs of code review will be borne by Customer.

*<Section Overview & Comments: This standard construction provision requires the ESCO comply with all code requirements, pay all associated permit fees and provide the Customer with copies of*

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**<Customer Name>**



*each permit and license required to do the work. The Customer agrees to assist the ESCO to the best of its ability to obtain required permits and approvals.>*

**SECTION 12.2. Coordination During Installation.** Customer and ESCO shall coordinate the activities of ESCO's equipment installers with those of the Customer, its employees, and agents. ESCO shall not commit or permit any act, which will interfere with the performance of business activities conducted by the Customer or its employees without prior written approval of the Customer.

*<Section Overview & Comments: This standard provision directs both the Customer and ESCO to coordinate equipment installation to avoid interference with the Customer's business activities. If an installation requires interference, the ESCO must first obtain the Customer's written approval to proceed. If a facility generates revenue for the agency (e.g. civic center, theater, arena etc.) and scheduled revenue-producing activities are interrupted due to the fault of the ESCO, either during project installation or operation, then a provision for the collection of damages may be negotiated.>*

## SECTION 13. CONSTRUCTION AND INSTALLATION BY ESCO

**SECTION 13.1. Construction Schedule.** Construction and equipment installation shall proceed in accordance with the construction schedule approved by Customer and attached hereto as **Schedule G (Construction and Installation Schedule)**.

*<Section Overview & Comments: The construction/installation phase of the project must be managed in compliance with Customer's requirements and governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases may be necessary, and would be referenced in the body of the contract and attached, or language could be incorporated into the body of the contract.>*

**SECTION 13.2 ESCO's Duty of Proper Installation.** All services called for by this Agreement which constitute the "practice of architecture" or the "practice of engineering", shall be performed by properly qualified and licensed professionals employed by ESCO and shall be performed in accordance with applicable law. ESCO shall perform all tasks/phases under this Agreement, including construction, and shall install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule I (Standards of Comfort)** and **Schedule G (Construction and Installation Schedule)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Agreement. Customer reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of Customer, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action caused by ESCO's breach of its obligations under this Agreement shall be borne by ESCO. All construction and installation by ESCO shall be in compliance with applicable building, fire and other codes in existence as of the date of this contract.

**SECTION 13.3 Subcontracts.** As used in this Agreement, the term “subcontractor” means a person or entity supplying both labor and materials, or labor only, for installation or maintenance related to the Equipment. Each and every subcontractor shall be properly qualified to perform the work that is the subject of such subcontract. Within thirty (30) days following execution of this Agreement, ESCO shall provide the Customer a complete list of all subcontractors. The ESCO shall not use any subcontractor the Customer objects to in writing as being unacceptable within five (5) days after receiving ESCO’s list. The ESCO agrees to bind each subcontractor to the terms of **Sections 9, 10, 11, 12, 13, 16 and 20 of this Agreement**. Nothing in this Agreement or otherwise shall create any contractual relationship whatsoever between any subcontractor and the Customer. The ESCO shall not grant or allow any lien or security interest for labor or material or otherwise on the Equipment, the Premises or other property owned by the Customer.

**SECTION 13.4. ESCO’s Superintendence and Supervision.** ESCO shall provide, during the progress of the installation and testing, a competent superintendent and any necessary assistants. The superintendent shall represent the ESCO and all directions or notices given to him or her shall be binding on the ESCO.

The superintendent shall give efficient supervision to the work, using his or her best skill and attention. The superintendent shall see that the work is carried out in accordance with this Agreement and in a thorough first-class manner in every respect. The superintendent shall establish all lines, level, and marks, if any, necessary to facilitate the operations of all concerned in such installation.

**SECTION 13.5. ESCO Responsibility.** ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether performed by the ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement.

**SECTION 13.6. Open Book Pricing.** Open book pricing will be required, such that the ESCO will fully disclose all costs. ESCO will maintain cost accounting records on authorized work performed documenting actual costs for labor and material, or other basis agreed to by the Customer. ESCO will afford Customer access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost markups disclosed during preliminary contract negotiations will be expected to be applied in costs presented in any subsequent technical audit or performance contract, providing the scope and size of the project remain the same as assumed when markups were disclosed.

**SECTION 13.7. Use of Stated Markups.**

In establishing the Contract Sum the ESCO has used the markups for overhead and profit as disclosed in the ESCO Proposal (Appendix B) and applied to the labor and material costs as shown in **Schedule O (Payment Schedule and Schedule of Values)**. It also has also provided a contingency budget equal to < % of labor and materials or \$ value>. The Contract Sum shall be adjusted based on the actual costs of labor and materials to the ESCO multiplied by the markups agreed to by the ESCO, but in no event shall the Contract Sum be increased. In the event it is possible to reduce the Contract Sum because the contingency budget is not spent or the actual labor and material costs are less than

budgeted, the Customer can, at its sole option, increase the Scope of Work to include additional equipment such that the original Contract Sum is reached. If the Customer declines to increase the scope of Work, at its sole option, the Contract Sum shall be reduced to an amount consistent with the pricing using the stated markups.

### **SECTION 13.8. Performance by ESCO**

ESCO shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule I (Standards of Comfort)** and the construction schedule specified in **Schedule G (Construction and Installation Schedule)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. The Customer reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the Customer, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the work shall be borne by ESCO.

ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether by the ESCO or its subcontractors or others on its behalf, throughout the term of this Contract.

*< Section Overview & Comments: This section directs the ESCO to protect the premises and its contents and repair and restore to the original condition any damage caused by the ESCO in connection with this contract. Any costs incurred to correct such damage will be paid by the ESCO. The ESCO is solely responsible for the technical professional accuracy of all work performed under this Contract including work done by subcontractors or others.>*

## **SECTION 14. TRAINING AND FOLLOW-UP ACTIVITIES BY ESCO**

**SECTION 14.1 Training.** The ESCO shall conduct the training program described in **Schedule M (ESCO's Training Responsibilities)**. Appropriate training must be completed prior to acceptance of the Equipment installation. The ESCO shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to the Customer.

**SECTION 14.2 Energy Star Application.** The ESCO shall conduct an Energy Star benchmarking study for each facility and apply for an Energy Star Label on behalf of Customer for all buildings that meet or exceed the necessary requirements for the Energy Star Label.

**SECTION 14.3 Emissions Reductions Documentation and Reporting.** The ESCO shall include emissions reductions quantities in each annual report and advise the Customer on opportunities to achieve monetary benefit from such credits.

*<Section Overview & Comments: Training of facility personnel is often conducted before acceptance of the completed installation. If it is necessary to conduct training after project acceptance, note this in the appropriate schedule. If there are charges for unscheduled training, it should be noted in this section.>*

### SECTION 15. OWNERSHIP

**SECTION 15.1. Ownership of Certain Proprietary Property Rights.** Customer shall not, by virtue of this Agreement, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. Customer shall, however, have a nonexclusive license to utilize all such intellectual or proprietary rights in connection with its use of the Equipment under this Agreement. The ESCO hereby grants to the Customer a perpetual, irrevocable, royalty-free license to any and all software or other intellectual property or proprietary rights necessary for the Customer to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions. This license shall continue subsequent to any termination or expiration of this Agreement other than termination due to breach by Customer.

*<Section Overview & Comments: In most cases, this provision addresses the ESCO's proprietary rights over customized (or exclusive) software used in an energy management system which may control, manage and perform other functions in conjunction with the project (there may other technical designs, processes, formulas etc., which this provision would cover). Of particular importance is the stipulation that grants the Customer a continuing license (at no charge) to use and operate the project without violating the ESCO's proprietary rights.>*

**SECTION 15.2. Ownership of Documents.** All drawings, reports and materials prepared by the ESCO specifically in performance of this contract shall become the property of Customer. Unless waived by the Customer in writing, within thirty (30) days following the Performance Commencement Date, ESCO shall provide the Customer as-built record drawings of the Equipment installation and all specifications therefor. "Drawings" shall include three sets of corrected prints, and electronic files in compliance with Customer's CAD standards *<insert desired format for electronic drawings>*. Additional documents will be provided as a change order.

**SECTION 15.3. Ownership of Existing Equipment.** Ownership of the equipment and materials existing at the Premises at the time of execution of this Agreement shall remain the property of Customer even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Agreement. If applicable, ESCO shall advise the Customer in writing of all equipment and materials to be replaced at the Premises and the Customer shall within fifteen (15) days designate in writing to the ESCO which equipment and materials should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the Customer shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. Except as may be otherwise provided in this Agreement, the ESCO shall be responsible for the disposal of all equipment and materials designated by the Customer as disposable off-site in

accordance with all applicable laws and regulations regarding such disposal. Under no circumstance shall ESCO be obligated to dispose of or take responsibility for any materials identified in **Section 9** of this Agreement.

*<Section Overview & Comments: This provision states that the Customer has ownership of all existing equipment and the ESCO shall notify the Customer in writing of what equipment and materials are to be replaced. If the Customer chooses to keep the equipment to be replaced, the ESCO will be notified and the Customer will be responsible for identifying the location of where the property is to be stored or relocated. The ESCO is responsible for all equipment and materials to be disposed. The exception to this is the treatment of any hazardous or environmentally sensitive materials.>*

**SECTION 15.4. Ownership of Measurement and Verification Equipment.** Customer agrees to provide rent-free space for the location of equipment required to provide the ongoing measurement of energy and water savings (the “Metering Equipment”). If required, Customer shall provide and maintain a non-dedicated telephone line to facilitate remote monitoring of the Equipment. Customer shall not by virtue of this Agreement, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the verification of savings by ESCO. ESCO shall insure such Metering Equipment at its own expense and Customer shall have no liability for such Metering Equipment except in the event of damage arising from the fault of the Customer.

## SECTION 16. LOCATION AND ACCESS

**SECTION 16.1. ESCO Access.** ESCO acknowledges that there exists sufficient space on the Premises for the installation and operation of the Equipment. Customer shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Agreement. Customer shall provide access to the Premises for ESCO to perform any function related to this Agreement during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Customer. ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. ESCO’s access to the Premises to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by Customer. ESCO shall immediately notify the Customer when emergency action is taken and follow up with written notice with three (3) business days specifying the action taken, the reasons therefor, and the impact upon the Premises, if any.

*<Section Overview & Comments: This provision states the Customer's responsibility for providing adequate space and protection for the installed equipment and authorizes the ESCO's access to the facility to perform routine and emergency operations.>*

**SECTION 16.2. Utility Access.** If a Utility Award Payment is made as described in **Section 8** (Utility Award Payments), the following applies. Upon request by the Utility (or its agent) and with prior consent of the Customer which consent shall not be unreasonably withheld, the Customer shall agree to allow Utility to interview the Customer and to enter the Premises at reasonable times



throughout the life of the installed equipment to install metering equipment, perform energy audits or inspect the facilities and any equipment installed. The Customer also agrees to cooperate with the Utility or its agent upon request and with prior consent of the Customer, in conducting such activities and/or in analyzing energy savings. At all times a representative of the Customer (or its agent) shall be present during such inspections.

*<Section Overview & Comments: Delete this section if a Utility Award Payment is not applicable.>*

### SECTION 17. EQUIPMENT SERVICE

*<Section Overview & Comments: This section refers to the maintenance and service responsibilities of each party as specified in **Schedules J (ESCO's Maintenance Responsibilities) and D (ESCO Monitoring, Maintenance and Service Agreement)**. It also states that if the Customer is at fault for causing additional maintenance or repair to the equipment, the Customer will be charged by the ESCO for maintenance or repair costs.>*

#### SECTION 17.1. Actions by ESCO.

During the Warranty Period, ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Agreement pursuant to **Schedule J (ESCO's Maintenance Responsibilities)**. Customer shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in **Schedule D (ESCO Monitoring, Maintenance and Service Agreement)**. Thereafter, Customer shall be responsible for and shall bear all costs associated with service, repairs, and adjustments to the Equipment.

**SECTION 17.2. Malfunctions and Emergencies.** Customer shall use its best efforts to notify the ESCO or its designated subcontractor within twenty-four (24) hours after the Customer's actual knowledge and occurrence of:

- (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the savings or savings guarantee,
- (ii) any interruption or alteration to the energy supply to the Premises, or
- (iii) any alteration or modification in any energy-related equipment or its operation.

Where Customer exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify a such conditions as having a material impact upon the savings. Customer shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. If such malfunction, interruption, or alteration occurs during the Warranty Period, ESCO shall respond to any such notice within twenty-four (24) hours and shall promptly thereafter proceed with corrective measures. Any telephonic notice of such conditions by Customer shall be followed within three



business days by written notice to ESCO from Customer. If Customer unreasonably delays in so notifying ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, ESCO may charge Customer for its loss, due to the delay, associated with the guaranteed savings under this Agreement for the particular time period, provided that ESCO is able to show the direct causal connection between the delay and the loss.

The ESCO will provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.

*<Section Overview & Comments: This section requires the Customer to notify the ESCO within a specified number of hours of actually knowing about any situation that impacts the performance of the equipment. The impacts cover both pre-existing energy related equipment and the newly installed equipment including equipment malfunction or modification, interruption of power supply or any emergency situation which may affect the energy savings guarantee. If such an impact is known by the Customer to have occurred and the Customer delays notifying the ESCO and doesn't correct the situation, it will be treated as a Material Change and the baseline will be adjusted accordingly. If the Customer makes an effort to assess the situation and incorrectly determines it doesn't have an impact, then the ESCO will not fault the Customer, although an adjustment to the baseline may still be warranted.>*

**SECTION 17.3. Actions by Customer.** During the term of this Agreement, Customer shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESCO except as set forth in **Schedule K (Customer's Maintenance Responsibilities)**. Notwithstanding the foregoing, Customer may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, Customer shall take reasonable steps to protect the Equipment from damage or injury. Customer agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment, all in accordance with the same standard of care the Customer applies to the Premises generally, that of a reasonably prudent government owner.

*<Section Overview & Comments: This section states the Customer may not make any changes to the operation and maintenance of the equipment without prior written approval of the ESCO unless otherwise indicated in **Schedule K (Customer's Maintenance Responsibilities)** or if there is an emergency and the ESCO can't be reasonably notified. In the case of such emergency, the Customer should follow instructions provided by the ESCO for emergency action.>*

## SECTION 18. STANDARDS OF COMFORT

During the term of this Agreement, ESCO will maintain and operate the Equipment in a manner that will provide the standards of heating, cooling, hot water, lighting and other systems as described in **Schedule I (Standards of Comfort)**.

*<Section Overview & Comments: This section references the standards of comfort contained in **Schedule I (Standards of Comfort)** that the ESCO is contractually liable to maintain throughout the contract term. These standards are negotiated between the ESCO and Customer to reflect realistic ranges of heating, cooling and hot water temperatures, lighting levels, chilled water requirements, and other specified comfort and operating parameters to be maintained.>*

### SECTION 19. MATERIAL CHANGES

**SECTION 19.1. Material Change Defined:** A Material Change shall include any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Customer, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Schedule E (Baseline Energy Consumption)** and **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)** by at least five (5) % after adjustments for climatic variations. Actions by the Customer that may result in a Material Change include but are not limited to the following:

- (i) manner of use of the Premises by the Customer; or
- (ii) hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
- (iii) permanent changes in the comfort and service parameters set forth in **Schedule I (Standards of Comfort)**; or
- (iv) occupancy of the Premises; or
- (v) structure of the Premises; or
- (vi) types and quantities of equipment used at the Premises or
- (vii) modification, renovation or construction at the Premises; or
- (viii) the Customer's failure to provide maintenance of and repairs to the Equipment in accordance with **Schedule K (Customer's Maintenance Responsibilities)**; or
- (ix) casualty or condemnation of the Premises or Equipment, or
- (x) changes in utility provider or utility rate classification, or
- (xi) any other conditions other than climate affecting energy or water use at the Premises.

*<Section Overview & Comments: This section defines the term "Material Change" which covers any condition other than weather, that affects building energy use by more than the negotiated percentage (see above discussion). It is typical for the percent of deviation to be negotiated as a*

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**<Customer Name>**

*value ranging between 2% and 5% based on aggregate consumption costs. The lower value (2%) may be appropriate for large facilities (over \$20,000/month utility bills) and the higher value (5%) may be appropriate for small facilities (less than \$5,000/month utility bills).>*

### **SECTION 19.2.      Reported Material Changes; Notice by Customer.**

The Customer shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least 21 days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Customer within twenty-four (24) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Customer to have occurred.

*<Section Overview & Comments: This section requires the Customer to notify the ESCO in writing if there are any actual or planned changes to the facility which would effect energy consumption by more than the negotiated percentage (see above discussion). In the event of an emergency or situation that would prevent advance notification, the Customer has a specified number of hours to inform the ESCO that a Material Change has occurred.>*

**SECTION 19.3.      Unreported Material Change.** In the absence of any Material Changes in the Premises or in their operations, the baseline energy consumption as set forth in **Schedule E (Baseline Energy Consumption)** should not change from year to year after adjustments for changes in climatic conditions. Therefore, if energy and water use for any month is more than five (5) % or more during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions then such deviation shall be deemed to have resulted from a Material Change, except where an increase is due to Equipment malfunction, malfunction of Premises systems, subsystems or components attributable to the Equipment, faulty repair or other negligence or breach of contract by ESCO. In the event an unreported Material Change is identified according to this Section 19.3, the ESCO shall attempt to identify the Material Change and report its findings to the Customer in a timely manner. The ESCO and Customer shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)** and **Schedule E (Baseline Energy Consumption)**. If no Material Change is identified by the ESCO then no adjustments to the baseline will occur.

*<Section Overview & Comments: This section states that if all building conditions and operations stay the same, then energy consumption will not vary more than the negotiated percentage (see above discussion) during any month when compared to the baseline use for that month and after adjustments for weather are made. In the event such a variation occurs, the ESCO will try to determine the cause of the deviation and report its findings to the Customer. The ESCO and Customer will then determine what adjustments will be made to the baseline as described in **Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline)**. Disputes may need to be addressed here.>*

**<Customer Name>**

**SECTION 20. INSURANCE REQUIREMENTS**

**SECTION 20.1 Liability Insurance.** The ESCO shall procure and maintain Comprehensive General Public Liability and Property Damage Insurance and Comprehensive Automobile Liability and Property Damage Insurance as hereinafter specified, at ESCO's own expense, during the life of this Agreement, written on an "occurrence" basis and naming the Customer as an additional insured. This insurance shall include a provision preventing cancellation without ninety (90) days' prior Notice by certified mail.

This insurance must protect the ESCO from all claims for bodily injury, including death, and all claims for destruction of or damage to property, arising out of or in connection with any operations under this Agreement, whether such operations are by ESCO or by any subcontractor or anyone directly or indirectly employed by the ESCO or by a subcontractor. All such insurance shall be written on a Comprehensive Form of Policy. In the event any of the hazards or exposures, normally listed in standard policies as "Exclusions," are involved or required under this Agreement, then such hazards or exposures shall be covered and protection afforded under the policy and such exclusions "(x)", "(c)" and "(u)", as excerpted from standard policies, must be removed from the policy as listed below:

- "(x) Injury to or destruction of any property arising out of blasting or explosion, other than the explosion of air or steam vessels, piping under pressure, prime movers, machinery of power transmitting equipment;"
- "(c) The collapse of or structural injury to any building or structure due to;
  - (1) grading of land, excavating, burrowing, filling, backfilling, tunneling, pile driving, cofferdam work or caisson work; or
  - (2) moving, shoring, underpinning, raising or demolition of any building or structure, or removal or rebuilding of any structural support thereof;"
- "(u) (1) injury to or destruction of wires, conduits, pipes, mains, sewers or other similar property, or any apparatus in connection therewith, below the surface of the ground, if such injury or destruction is caused by and occurs during the use of mechanical equipment for the purpose of grading of land, paving, excavating or drilling; or
  - (2) injury to or destruction of property at any time resulting therefrom."

**SECTION 20.2. Liability Insurance, Limits and Coverages.** Such insurance shall be written with limits and coverages as follows:

- (i) General Liability: Minimum limit of liability per occurrence of \$600,000 combined single limit for bodily injury and/or property damage. The following coverage shall be included:

1. Explosion/Collapse Hazard
2. Underground Hazard
3. Products/Completed Operations Hazard
4. Broad Form Contractual
5. Independent Contractors
6. Comprehensive Form
7. Broad Form Property Damage
8. Personal Injury

- (i) Automobile Liability: Minimum limit of liability per occurrence of \$600,000 combined single limit for bodily injury and/or property damage. The following coverages shall be included:

1. Owned automobiles
2. Non-owned automobiles
3. Hired automobiles

- (i) Excess General and Automobile Liability: Minimum limit of liability per occurrence of \$1,000,000 combined single limit for bodily injury and/or property damage.

**SECTION 20.3 Installation Risk Insurance.** ESCO shall effect and maintain, at ESCO's expense, All Risk Installation Floater insurance in the dollar amount equal to the total insurable value of the construction contemplated by this Agreement. The insurance shall remain in effect until Customer acceptance of the installation as provided for in this Agreement. The following shall also apply:

- (i) The ESCO waives all rights of subrogation as regards the **State of Colorado**, its officials, its officers, its agents and its employees, all while acting within the scope a course of their employment. The insurer shall not void such insurance policy by reason of the ESCO waiving said rights. Such policy may have a deductible clause but not to exceed one thousand dollars (\$1,000).
- (ii) The Insurance shall include a provision preventing cancellation without ninety (90) days' prior Notice in writing by certified mail.
- (iii) All such insurance shall insure the **State of Colorado** acting by and through the named agency or institution which is a party to this Agreement, the ESCO and the ESCO's subcontractors as their interests may appear, but the loss, if any, shall be payable to the State Controller, as Trustee.
- (iv) The Certificate of Insurance shall specifically state the inclusion of the provisions hereinabove.
- (v) Unless it is agreed otherwise, all monies received shall be applied on rebuilding or repairing the destroyed or injured work.

**SECTION 20.4 Workers' Compensation Insurance.** Standard Workers' Compensation and Employer Liability Insurance as required by Customer statute, including occupational disease, covering all employees at the worksite. ESCO shall require that all subcontractors also maintain such Insurance for their own employees. ESCO accepts full liability and responsibility for all subcontractor employees not so covered. In cases where any class of employees engaged in hazardous work under this Agreement at the worksite is not protected under Workers' Compensation statute, ESCO shall provide, and shall cause each subcontractor to provide adequate and suitable insurance for the protection of such employees not otherwise protected.

**SECTION 20.5 Professional Liability Insurance.** ESCO shall maintain in full force and effect, at ESCO's expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$600,000 minimum coverage. The policy shall remain in effect for the duration of the applicable statute of limitations for claims against construction professionals. The ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys fees, arising out of or resulting from the performance of professional services contemplated by this Agreement, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property, or to failures of the work, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of the ESCO, any consultant or associate thereof, anyone directly or indirectly employed by the ESCO. The ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

**SECTION 20.6 Certificate and Endorsements.** Prior to commencement of work under this Agreement, ESCO is required to provide Customer with complete current certificates of insurance evidencing the required coverages specified above and endorsements to the policies listing Customer as additional insured (other than for workers' compensation and professional liability). ESCO shall also immediately provide written notice to Customer of any notice of cancellation received from any insurer.

**SECTION 20.7** At all times during the term of this Agreement, Customer shall maintain in full force and effect at its expense, standard perils Casualty insurance on the Equipment and Liability insurance in accordance with applicable **Colorado** law.

**SECTION 20.8** Certificates of Insurance and insurance policies required of ESCO by this Agreement shall be subject to the following stipulations:

- (i) The clause entitled "Other Insurance Provisions" contained in any policy including the **State of Colorado** as an additional named insured shall not apply to the **State of Colorado**. Coverage will be limited to liability arising out of operations performed for the Customer by or on behalf of the ESCO, but only to the extent of damages caused by the negligence of the ESCO.
- (ii) The insurance companies issuing the policy or policies shall have no recourse against the **State of Colorado** for payment of any premiums due or for any assessments under any form of any policy.



- (iii) Any and all deductibles or self-insured retentions contained in any insurance policy shall be assumed by and at the sole risk of the ESCO.
- (iv) If any of the said policies shall be or at any time become unsatisfactory to the **State of Colorado** as to form or substance, or if a company issuing any such policy shall be or at any time become unsatisfactory to the **State of Colorado**, the ESCO shall promptly obtain a new policy, submit the same to the Customer for approval and thereafter submit a Certificate of Insurance as hereinbefore provided. Upon failure of the ESCO to furnish, deliver and maintain such insurance as provided herein, this Agreement, in the sole discretion of the Customer may be immediately declared suspended, discontinued, or terminated. Failure of the ESCO in obtaining and/or maintaining any required insurance shall not relieve the ESCO from any liability under the Agreement, nor shall the insurance requirements be construed to conflict with the obligations of the ESCO concerning indemnification.
- (v) Prior to cancellation of or material change in any requisite policy, a minimum of ninety (90) days written notice shall be given to the Customer by means of registered mail, return receipt requested. All notices shall name the ESCO and identify the premises and Project Name.
- (vi) All requisite insurance shall be obtained from financially responsible insurance companies, licensed in the **State of Colorado** and acceptable to the Customer.
- (vii) Receipt, review or acceptance by the Customer of all Insurance Policies, Certificates of Insurance and bonds required under this Agreement shall not be construed as a waiver or relieve the ESCO from its obligation to meet the insurance and bond requirements of the Agreement.

*<Section Overview & Comments: This section needs to reflect the individual Customer's requirements with regard to insurance and indemnification.>*

### SECTION 21. CONDITIONS BEYOND CONTROL OF THE PARTIES

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, materials or labor shortages, or similar events, this Agreement shall at the other party's option remain in effect but the obligations of both parties shall be suspended until the said events shall have ended.

### SECTION 22. EVENTS OF DEFAULT

**SECTION 22.1. Events of Default by Customer.** Each of the following events or conditions shall constitute an "Event of Default" by Customer:

- (i) any failure by Customer to pay ESCO any sum due hereunder for a service and maintenance period of more than thirty (30) days after written notification by ESCO that Customer is delinquent in making payment;

- (ii) any other material failure by Customer to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after notice to Customer demanding that such failures to perform be cured or if such cure cannot be effected in such thirty (30) days, Customer shall be deemed to have cured default upon the commencement of a cure within such thirty (30) days and diligent subsequent completion thereof;
- (iii) any representation or warranty furnished by Customer in this Agreement that was false or misleading in any material respect when made.
- (iv) The filing of a bankruptcy petition whether by Customer or its creditors against Customer which proceeding shall not have been dismissed within 90 days of its filing, or an Involuntary assignment for the benefit of all creditors of the liquidation of Customer.

**SECTION 22.2. Events of Default by ESCO.** Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (i) the standards of comfort and service set forth in **Schedule I (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within seven (7) days after written notice by Customer to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract.
- (ii) any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in **Schedule A (Equipment to be Installed by ESCO)** and **Schedule G (Construction and Installation Schedule)**;
- (iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in **Schedule I (Standards of Comfort)** are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Agreement;
- (v) any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESCO which is not released in thirty days;

- (vi) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within 90 days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO.
- (vii) failure by the ESCO to pay any amount due, or perform any obligation under the terms of this Agreement.

### SECTION 23. REMEDIES UPON DEFAULT

**SECTION 23.1. Remedies upon Default by Customer.** If an Event of Default by Customer occurs, ESCO may, without a waiver of other remedies that exist in law or equity:

- (i) exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Customer, and/or for damages which shall include all costs and expenses reasonably incurred, including reasonable attorney fees;
- (ii) terminate this Agreement.

**SECTION 23.2. Remedies Upon Default by ESCO.** In the Event of Default by ESCO, Customer may, without waiver of other remedies which exist in law or equity, exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of damages, which shall include all costs and expenses reasonably incurred, including reasonable attorney fees. The customer may also terminate this Agreement.

### SECTION 24. ASSIGNMENT

The ESCO acknowledges that the Customer is induced to enter into this Contract by, among other things, the professional qualifications of the ESCO. The ESCO agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of the Customer.

**SECTION 24.1. Assignment by ESCO.**

- (i) The ESCO acknowledges that the Customer is induced to enter into this Agreement by, among other things, the professional qualifications of the ESCO. The ESCO agrees that except as provided below, neither this Agreement nor any right of obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of the Customer.

- (ii) Notwithstanding the foregoing, in the event of a sale, transfer, or reorganization of ESCO as an entity, ESCO shall have the right to assign all of its rights and delegate all of its duties under or pursuant to this Agreement without any prior consent or approval of Customer.
- (iii) The ESCO may, with prior written approval of the Customer, which consent shall not be unreasonably withheld, utilize subcontractors, provided that any subcontractor(s) shall fully comply with the terms of this Agreement. The provisions of Section 13.3 pertaining to subcontracts shall apply to any and all subcontract(s). Proposed subcontractor(s) for other than installation shall be tendered to the Customer for approval of at least ten (10) days prior to execution of any such subcontract. No such assignment shall relieve the ESCO of any obligation under this Agreement.

*<Section Overview & Comments: This assignment provision acknowledges that the Customer selected the ESCO for its unique expertise and qualifications to perform the services specified in the contract. The ESCO may not assign this contract to another ESCO without the written approval of the Customer and any ESCO assigned this contract must fully comply with all terms and conditions. The ESCO and any assignee remain contractually liable to the Customer for fulfilling all of the ESCO's obligations as specified in the contract.>*

**SECTION 24.2. Assignment by Customer.** Customer may transfer or assign this Agreement and its rights and obligations herein to a successor or purchaser of the Premises or an interest therein with the consent of ESCO, which shall not be unreasonably withheld.

*<Section Overview & Comments: This provision allows the Customer to transfer or assign this contract to a new building owner or occupant. The assignee, however, still remains responsible to the ESCO for the obligations as specified in the contract.>*

## SECTION 25. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

- (i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this Agreement have been duly authorized by, or are in accordance with, its organic instruments, and this Agreement has been duly executed and delivered for it by the signatories so authorized and it constitutes its legal, valid, and binding obligation;
- (iii) its execution, delivery, and performance of this Agreement will not result in a breach or violation of, or constitute a default under any Agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or

- (iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

*<Section Overview & Comments: This boilerplate provision states that each party has the requisite authority and ability to enter into this contract.>*

### SECTION 26. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

Customer hereby warrants, represents and promises that:

- (i) Customer is authorized under the Constitution and laws of the **State of Colorado** to enter into this Agreement, each transaction contemplated hereby, and to perform all of its obligations under this Agreement.
- (ii) Customer has provided or shall provide timely to ESCO, all records relating to energy and water usage and energy-related maintenance of Premises requested by ESCO and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement will be true and accurate in all material respects; and
- (iii) Customer has not entered into any prior leases, contracts or agreements with other persons or entities regarding the leasing or acquisition of water or energy efficiency equipment or the provision of energy management services for the Premises or with regard to servicing any of the energy related equipment located in the Premises that would encroach upon the scope of this contract. Customer shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Premises that may be executed from time to time hereafter within seven days after execution thereof.
- (iv) The authorization, approval and execution of the Agreement and all other proceedings of Customer relating to the transactions contemplated thereby have been performed in accordance with all applicable open meeting, public records, public bidding and all other laws, rules and regulations of Customer.

**SECTION 26.2. By ESCO.** ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of this Agreement:
  - (a) ESCO shall have become licensed or otherwise permitted to do business in the **State of Colorado**
  - (b) ESCO shall have provided proof and documentation of all required insurance and bonds pursuant to this Agreement.

- (i) ESCO shall make available, upon reasonable request, documents relating to its performance under this Agreement, including contracts and subcontracts it shall enter into;
- (ii) ESCO shall use subcontractors who are qualified, licensed and bonded in this State to perform the work so subcontracted pursuant to the terms hereof;
- (iii) ESCO has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Agreement;
- (iv) The Equipment will meet or exceed the Acceptance Testing Standards set forth in this Agreement.
- (v) The Equipment is or will be compatible with all other Premises mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;
- (vi) That ESCO is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Installation and perform its obligations under this Agreement.

*<Section Overview & Comments: These additional representations address several areas specific to the performance contract. The Customer certifies it has or will provide the ESCO will all energy and energy-related records and all future records to be provided will be truthful and accurate. The Customer also declares it has not entered into any leases or service contracts relating to energy equipment or servicing of pre-existing equipment and will notify the ESCO within a specified period of time if it does so.*

*As well, the ESCO certifies that before beginning work under this contract it will: have become licensed to business in the state; provide proof of required insurance; give Customer access to all document relating to the project (including all contracts and subcontracts) upon request; use state-licensed and qualified subcontractors; and is financially able to complete the project and perform under the terms of this contract.>*

### **SECTION 27. WAIVER OF LIENS, PERFORMANCE BONDS, LABOR AND MATERIAL PAYMENT BONDS**

**SECTION 27.1 Bonds.** ESCO shall furnish a Performance Bond and a Labor and Material Payment Bond on approved Customer forms, executed by a corporate Surety licensed to transact such business in the **State of Colorado** in the full amount of the Contract Sum. The expense of these bonds shall be

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**<Customer Name>**



borne by the ESCO and the bonds submitted to the Customer at the time of contract execution. Such executed bonds are incorporated herein by reference as **Exhibit I (Performance Bond)** and **Exhibit II (Labor and Material Payment Bond)**. If, at any time, a Surety on such a bond becomes irresponsible or loses his right to do business in the **State of Colorado**, another Surety will be required, with the ESCO shall furnish to the Customer within ten (10) days after receipt of Notice.

**SECTION 27.2 Liens.** **Colorado** law does not provide any right of mechanics lien against public property. In lieu thereof, **Section 38-26-107, Colorado Revised Statutes**, as amended, provides adequate relief for unpaid labor or materials. Although no right of lien exists, ESCO will obtain and furnish to Customer a Waiver of Lien from each vendor, materialman and laborer in the furnishing, installation and servicing of each piece of Equipment as additional protection against unpaid labor or materials. Notwithstanding anything in this Agreement to the contrary, payments hereunder will not commence until such creditors have been afforded notice and opportunity to stop such payments in accordance with the cited statute.

*<Section Overview & Comments: This is a standard construction contracting provision.>*

## SECTION 28. COMPLIANCE WITH LAW AND STANDARD PRACTICES

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and regulations, in accordance with sound engineering and safety practices and in compliance with any and all reasonable rules of Customer relative to the Premises. ESCO shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder.

*<Section Overview & Comments: This is a standard contracting provision.>*

## SECTION 29. NO WAIVER

The failure of ESCO or Customer to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of ESCO or Customer.

*<Section Overview & Comments: This is a standard construction contracting provision.>*

## SECTION 30. SEVERABILITY

In the event that any clause or provision of this Agreement or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not effect the validity or enforceability of the remaining portions of this Agreement unless the result would be manifestly inequitable or unconscionable or unlawful.

**SECTION 31. COMPLETE AGREEMENT**

This Agreement, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by this Agreement shall constitute the entire Agreement between both parties and this Agreement may not be amended, modified, or terminated except by a written Agreement signed by the parties hereto in accordance with **State of Colorado Fiscal Rules**.

**SECTION 32. FURTHER DOCUMENTS**

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

**SECTION 33. APPLICABLE LAW**

This Agreement and the construction and enforceability thereof shall be interpreted under the laws of the **State of Colorado**.

**SECTION 34. NOTICE AND CONSENT**

Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice. Any consent required hereunder shall not be unreasonably withheld.

TO ESCO:                    *<ESCO Name, Attention, Mailing address.>*  
                                  *< Include COPY TO: information for ESCO, if applicable.>*

TO CUSTOMER:        *<Customer Name, Attention, Mailing address.>*  
                                  *< Include COPY TO: information for CUSTOMER, if applicable. >*

**SECTION 35. CUSTOMER'S COMPLIANCE WITH CHECKLIST**

**SECTION 35.1.** The parties further acknowledge and agree that said Energy and Cost Savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Customer on a regular and continuous basis.

**SECTION 35.2.** Customer agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on **Schedule K (Customer's**

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***<Customer Name>***

**Maintenance Responsibilities**), to be attached hereto and made a part hereof after Customer's approval.

**SECTION 35.3.** Customer agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if Customer is complying, and shall have complied with its obligations as set forth above in Section 35.2. For the purpose of determining Customer's said compliance, the checklist to be set forth at **Schedule L (Facility Maintenance Checklist)** as completed and recorded by ESCO during its monthly inspections, shall be used to measure and record Customer's said compliance. Customer shall make the Premises available to ESCO for and during each monthly inspection, and shall have the right to witness each inspection and ESCO's recordation on the checklist. Customer may complete its own checklist at the same time.

*< Section Overview & Comments: This provision protects both the ESCO and the Customer by establishing a method for the ESCO to supervise the Customer's compliance with the scheduled routine and preventative maintenance activities to be performed by the Customer (either by in-house personnel or existing maintenance contract). This checklist should be developed for both the newly installed and pre-existing energy-related equipment.>*

## SECTION 36. HEADINGS

Headings and subtitles used throughout this Agreement are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

## SECTION 37. CUSTOMER LIABILITY EXPOSURE

Notwithstanding any other provision of this Agreement to the contrary, no term of condition of this Agreement shall be construed or interpreted as a waiver of any provision of the **Colorado Governmental Immunity Act, 24-10-101, et seq., Colorado Revised Statutes (C.R.S.)**, as now or hereafter amended. The parties hereto understand and agree that liability for claims for injuries to persons or property arising out of the negligence of the **State of Colorado**, its departments, institutions, agencies, boards, officials, and employees is controlled **and limited by the provisions of 24-10-101, et seq., C.R.S., as now are hereafter amended, and 24-30-1501, et seq., C.R.S., as now or hereafter amended.** Any provision of this Agreement, whether or not incorporated herein by reference, shall be controlled, limited, and otherwise modified so as to limit any liability of the Customer to the above cited laws.

## SECTION 38. SPECIAL PROVISIONS

### (Not for Use with Inter-Governmental Contracts)

1. CONTROLLER'S APPROVAL. CRS 24-30-202 (1)

*This contract shall not be deemed valid until it has been approved by the **Controller of the State of Colorado** or such assistant as he may designate.*

2. FUND AVAILABILITY. CRS 24-30-202 (5.5)

*Financial obligations of the **State of Colorado** payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.*

3. INDEMNIFICATION.

*The ESCO shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the ESCO, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.*

4. INDEPENDENT CONTRACTOR. 4 CCR 801-2

*THE CONTRACTOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER THE CONTRACTOR NOR ANY AGENT OR EMPLOYEE OF THE CONTRACTOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. CONTRACTOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX AND LOCAL HEAD TAX ON ANY MONIES PAID BY THE STATE PURSUANT TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKERS' COMPENSATION (AND PROVIDE PROOF OF SUCH INSURANCE WHEN REQUESTED BY THE STATE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.*

5. NON-DISCRIMINATION.

*The contractor agrees to comply with the letter and the spirit of all applicable state and federal laws respecting discrimination and unfair employment practices.*

6. CHOICE OF LAW.

*The laws of the **State of Colorado** and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the contract is capable of execution.*

*At all times during the performance of this contract, the ESCO shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.*

7. **VENDOR OFFSET. CRS 24-30-202 (1) & CRS 24-30-202.4**

*Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.*

8. **EMPLOYEE FINANCIAL INTEREST. CRS 24-18-201 & CRS 24-50-507**

*The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described herein.*

*Revised: 12/1/01*

## Energy Performance Contract

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### THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

CONTRACTOR:

**STATE OF COLORADO:  
BILL OWENS, GOVERNOR**

\_\_\_\_\_  
Legal Name of Contracting Entity

By \_\_\_\_\_  
Executive Director

\_\_\_\_\_  
Social Security Number or FEIN

Department of \_\_\_\_\_

\_\_\_\_\_  
Signature of Authorized Officer  
\_\_\_\_\_

LEGAL REVIEW:

ATTORNEY GENERAL

\_\_\_\_\_  
Print Name & Title of Authorized Officer

By \_\_\_\_\_

#### **CORPORATIONS:**

(A corporate seal or attestation is required.)

Attest (Seal) By \_\_\_\_\_  
(Corporate Secretary or Equivalent, or Town/City/County Clerk)

### ALL CONTRACTS MUST BE APPROVED BY THE STATE CONTROLLER

**CRS 24-30-202** requires that the State Controller approve all state contracts. This contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. The contractor is not authorized to begin performance until the contract is signed and dated below. If performance begins prior to the date below, the **State of Colorado** may not be obligated to pay for the goods and/or services provided.

STATE CONTROLLER:

\_\_\_\_\_  
By \_\_\_\_\_

Date \_\_\_\_\_

Revised: 12/1/01



**SECTION 39. FISCAL FUNDING**

- (i) As prescribed by **State of Colorado Fiscal Rules**, it is understood and agreed this lease is dependent upon the continuing availability of funds beyond the term of the State's current fiscal period ending upon the next succeeding June 30, as financial obligations of the **State of Colorado** payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available. Further, the parties recognize that the act of appropriation is a legislative act, and the Lessee hereby covenants to take such action as is necessary under the laws applicable to the Lessee to timely and properly budget for, request of and seek and pursue appropriation of funds of the Legislature of the **State of Colorado** which will permit Lessee to make all payments required under this lease during the period to which such appropriation shall apply. In the event there shall be no funds made available, this lease shall terminate at the end of the then current fiscal year, with no penalty or additional cost as a result thereof to the Lessee.
- (ii) To make certain the understanding of the parties because this lease will extend beyond the current fiscal year, Lessee and Lessor understand and intend that the obligation of the Lessee to pay the monthly rental hereunder constitutes a current expense of the Lessee payable exclusively from Lessee's funds and shall not in any way be construed to be a general obligation indebtedness of the State of Colorado or any agency or department thereof within the meaning of any provision of Sections 1,2,3,4, or 5 of Article XI of the Colorado Constitution, or any other constitutional or statutory limitation or requirement applicable to the State concerning the creation of indebtedness. Neither the Lessee, nor the Lessor on its behalf, has pledged the full faith and credit of the State, or any agency or department thereof to the payment of the charges hereunder, and this lease shall not directly or contingently obligate the State or any agency or department thereof to apply money from, or levy or pledge any form of taxation to, the payment of the annual rental charges.
- (iii) With such limitations in mind, Lessee contracts to lease the Premises herein before described and has reason to believe that sufficient funds will be available for the full term of this lease. Where, for reasons beyond Lessee's control, Lessee's funding entity does not allocate funds for any fiscal period beyond the one in which this lease is entered into, or does not allocate funds to continue this lease from the then current fiscal period, such failure to obtain funds not resulting from any act or failure to act on the part of Lessee, Lessee will not then be obligated to make the payments remaining beyond Lessee's then current fiscal period. In such event, Lessee shall notify Lessor of such non-allocation of funds by sending written notice thereof to the Lessor forty-five (45) days prior to the effective date of termination.
- (iv) The parties hereto further understand and agree that the only funds that have or may be so appropriated and available for payment under this lease in any one particular fiscal year are for the purpose and in an amount sufficient only to pay the rental charges. Therefore, notwithstanding anything herein to the contrary, the payment by the Lessee

of any other charges, liabilities, costs, guarantees, waivers, and any awards thereon of any kind pursuant to this lease against Lessee are contingent upon funds for such purpose(s) being appropriated, budgeted and otherwise made available through the said State of Colorado legislature process.

### SECTION 40. SCHEDULES AND EXHIBITS

The following Schedules and Exhibits are attached hereto (or will be, as provided in this Agreement) and are made a part of this Agreement by reference.

#### SECTION 40.1 Schedules

<b>Schedule A</b>	<b>Equipment to be Installed by ESCO</b>
<b>Schedule B</b>	<b>Description of Premises; Pre-Existing Equipment Inventory</b>
<b>Schedule C</b>	<b>Energy and Cost Savings Guarantee</b>
<b>Schedule D</b>	<b>ESCO Monitoring, Maintenance and Service Agreement</b>
<b>Schedule E</b>	<b>Baseline Energy Consumption</b>
<b>Schedule F</b>	<b>Savings Measurement &amp; Calculation Formulae; Methodology to Adjust Baseline</b>
<b>Schedule G</b>	<b>Construction and Installation Schedule</b>
<b>Schedule H</b>	<b>Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment</b>
<b>Schedule I</b>	<b>Standards of Comfort</b>
<b>Schedule J</b>	<b>ESCO's Maintenance Responsibilities</b>
<b>Schedule K</b>	<b>Customer's Maintenance Responsibilities</b>
<b>Schedule L</b>	<b>Facility Maintenance Checklist</b>
<b>Schedule M</b>	<b>ESCO's Training Responsibilities</b>
<b>Schedule N</b>	<b>General Conditions &lt;for State of Colorado agencies, or others as applicable&gt;</b>
<b>Schedule O</b>	<b>Payment Schedule and Schedule of Values</b>

#### SECTION 40.2 Exhibits

Exhibit I	Performance Bond
Exhibit II	Labor and Material Payment Bond
Exhibit III (i)	Certificate of Acceptance—Technical Energy Audit
Exhibit III (ii)	Certificate of Acceptance—Installed Equipment
Exhibit IV	Operations and Maintenance Manuals
Exhibit V	Equipment Warranties
Exhibit VI	Form of Letter of Credit

#### SECTION 40.3 Appendices

Appendix A	RFP for ESCO Solicitation
Appendix B	ESCO Proposal
Appendix C	Technical Energy Audit

### OTHER POSSIBLE CONTRACT SECTIONS

#### **NONSUBSTITUTION**

In the event of a termination of this contract due to the nonappropriation of funds or in the event this Contract is terminated by ESCO due to a default by the Customer, the Customer agrees, to the extent permitted by law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by ESCO under the terms of this Contract for a period of three-hundred sixty five (365 ) days following such default by Customer, or termination of this Contract due to non-appropriation of funds.

*< Section Overview & Comments: To protect the ESCO, this provision prevents the Customer from securing funding for the same purposes for a period of one year following the termination of the contract or default due to non-appropriation.>*

#### **ARBITRATION**

Any dispute, controversy, or claim arising out of or in connection with, or relating to this Contract, or any breach or alleged breach hereof, shall, upon the request of any party involved (and without regard to whether or not any provision of this Contract expressly provides for arbitration), be submitted to and settled by arbitration in the **State of Colorado**, in conformance with the rules of the American Arbitration Association then in effect for commercial disputes (or at any other place or under any other form of arbitration mutually acceptable to the parties). Any award rendered thereon may be entered in the highest court of a forum, state or federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the cost of its own experts, evidence, and counsel.

**ATTACHMENT I: Schedules, Exhibits, Appendices**

### SCHEDULE A. EQUIPMENT TO BE INSTALLED BY ESCO

*< Section Overview & Comments: This schedule will be furnished by the ESCO based on the final Technical Energy Audit. It should specify all of the newly installed equipment including manufacturer, quantity, location and warranties (you can also have a separate schedule for warranties). The information should be provided in sufficient detail by building or area of building so that the Customer can verify the number of units installed under the contract. This is particularly important for a lighting retrofit and is used as the basis for making adjustments to the Contract Sum if the number of fixtures actually retrofit is different than the number estimated. Detailed specifications of major pieces of equipment such as boilers, chillers, motors should be provided. A detailed points list of any energy management control system should be provided along with the major control strategies being implemented. This schedule should also describe any modifications that may have to be made to existing equipment, if applicable.>*

### SCHEDULE B. DESCRIPTION OF PREMISES; PRE-EXISTING EQUIPMENT INVENTORY

*<Note to Customer: Schedule B: This schedule is based on the final Technical Energy Audit. It contains basic information about the condition of the premises at the time of contract execution. Such information would include facility square footage, building construction, use, occupancy, hours of operation etc., and any special conditions that may exist.*

*The inventory is important to include for the purpose of identifying what equipment was in place and how it was configured at the time of contract execution. This schedule is important to the accurate establishment of baseline, savings measurement and may need to be referred to in the later years of the contract. It is critical that if M&V option C of the International Performance Monitoring and Verification protocol is used for establishing the savings, then a detailed list of the existing energy consuming equipment of the facility be documented in great detail. If Option A or B is used, then the pre-existing equipment inventory can be eliminated.>*

### SCHEDULE C: ENERGY AND COST SAVINGS GUARANTEE

*< Section Overview & Comments: This schedule should fully describe all provisions and conditions of the energy saving guarantee provided by the ESCO. The guarantee should be defined in units of energy to be saved for the duration of the contract term and provide a mechanism to calculate dollar savings. Reference to the annual reconciliation of achieved vs. guaranteed savings should be included (there is also language in the body of the contract regarding annual reconciliation See Section 4.2). Guidelines for the guarantee were established in the RFP, so ensure compliance with RFP intent.>*

*< Section Overview & Comments: This schedule should contain the projected energy savings in units for each year of the contract. Often these projections are broken down on a measure-by-measure basis, although some measures may be aggregated into general categories such as lighting*

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**<Customer Name>**



*or HVAC. If there are several buildings involved in the project, this schedule should contain projections for each facility, even though they may all be covered under a single guarantee.>*

### **SCHEDULE D: ESCO MONITORING, MAINTENANCE AND SERVICE AGREEMENT**

*<Section Overview & Comments: This should contain the amount and frequency of any payments that may be made to the ESCO for maintenance, monitoring or other services negotiated as part of the contract. It should contain information about how the compensation is calculated (e.g. a percentage of savings above and beyond the guarantee, flat fee etc.), and if an annual inflation index is to be used to escalate fees over the duration of the contract term. An hourly fee structure can also be included to cover ESCO costs for any services provided beyond the scope agreed to at the time of contract execution.>*

*<Note to Colorado municipalities, counties and school districts: CRS 29-12.5-101(3) provides that calculated savings of energy and costs attributable to measures shall, for each year of an energy performance contract, exceed all contractual payments to be made during such year by the Customer except for payments for maintenance and repairs and obligations on the termination of the contract prior to expiration.>*

### **SCHEDULE E: BASELINE ENERGY CONSUMPTION**

*<Section Overview & Comments: The baseline energy consumption is the "yardstick" by which all savings achieved by the installed project will be measured. The methodology and all supporting documentation used to calculate the baseline should be in this schedule including unit consumption and current utility rates for each fuel type. This schedule may also include baseline documentation regarding other cost savings such as material savings (e.g. bulbs, ballast, filters, chemicals etc.), and cost savings associated with the elimination of outside maintenance contracts. >*

*<For each site or project, the baseline and post-installation energy use will usually be defined using metering, billing analysis and/or engineering calculations (including computer simulations) either individually or in combination. In addition, values for certain factors that affect energy use and savings that are beyond the ESCO's control may be stipulated using historical data, analyses and/or results of spot or short-term metering. The owner or the ESCO can define baseline conditions. If the owner defines the baseline, the ESCO will have the opportunity to verify it. If the baseline is defined by the ESCO, the owner will have the opportunity to verify.*

*<Baseline physical conditions (equipment inventory and conditions, occupancy, nameplate data, energy consumption rate, control strategies, etc.) are typically determined through well-documented audits, surveys, inspections and/or spot or short-term metering. This documentation will define the baseline for calculating savings and document baseline conditions in case future changes require baseline energy use adjustments.>*

### SCHEDULE F: SAVINGS CALCULATION FORMULAE; METHODOLOGY TO ADJUST BASELINE

*< Section Overview & Comments: This schedule contains a description of the energy savings measurement, monitoring and calculation procedures used to verify and compute the savings performance of the installed equipment will be contained in this schedule. The Customer should consider requiring the ESCO to use the International Performance Monitoring and Verification Protocol 2000 as the basis of the savings calculation methodology. This protocol provides four options for M&V and covers all possible energy and water efficiency measures and is the accepted international standard for M&V of performance contracts.*

*This calculation will include a method to compare the level of energy that would have been consumed without the project (referred to as the "Baseline") with what amount of energy was actually consumed during a specific time period (monthly, quarterly, etc.). All methods of measuring savings including engineered calculations, metering, equipment run times, pre- and post-installation measurements, etc. should be explicitly described for all equipment is installed.*

*A clear methodology for converting energy savings into energy cost savings should be provided. The utility rates to be used for the baseline and actual energy costs should be defined. How the calculations are affected by rising or lowering utility rates should be clearly described.*

*Periodically (typically on an annual basis), the baseline will be adjusted to account for the prevailing conditions (e.g., weather, billing days, occupancy, etc.) during the measurement period. All methodologies used to account for any adjustments to the baseline needs to be clearly defined in this schedule.>*

*Examples of baseline adjustments include: change in the amount of space being air conditioned, changes in auxiliary systems (towers, pumps, etc.), and changes in occupancy or schedule. For example, if a chiller retrofit was completed in a building with 100,000 square feet of conditioned space and during the contract term the conditioned space is reduced to 75,000 square feet, post-installation energy use would be lower making savings higher. If there are no records of the amount of originally conditioned space, the baseline could not be adjusted. Baseline adjustments for issues such as changes in production shifts, facility closures, adding new wings or loads (such as computer labs) require a conceptual approach versus a method to cover each eventuality. Clearly predictable annual variations are usually handled through established procedures for each identified factor in the savings formulas. Permanent changes, such as changes in square footage, are handled through agreement clauses that allow predictable or expected changes and/or through a "re-open" clause that allows either party to renegotiate the baseline.>*

*<A Facility Changes Checklist or other method may be provided by the ESCO for the Customer to notify the ESCO of any changes in the facility that could have an impact on energy use (occupancy, new equipment, hours of use, etc.). This checklist is generally submitted on a monthly or quarterly basis.>*

### SCHEDULE G: CONSTRUCTION AND INSTALLATION SCHEDULE

*< Section Overview & Comments: The timetables and milestones for project construction and installation should be contained in this schedule. Any penalties for late installation should also be documented here. Documentation of required insurance, subcontractor lists and any MBE/WBE required subcontracts can be included in this schedule or broken out into a separate schedule. NOTE: It is important that the construction/installation phase of the project (for example bonds and insurance) be treated in compliance with individual institutional requirements and the appropriate governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referred to in the body of the contract and attached as an exhibit, appendix or other type of attachment. Another approach would be to consolidate the appropriate construction language for inclusion in the body of the final contract. This will need to be decided as appropriate on a case-by-case basis.>*

### SCHEDULE H: SYSTEMS START-UP AND COMMISSIONING; OPERATING PARAMETERS OF INSTALLED EQUIPMENT

*< Section Overview & Comments: This section should specify the performance testing procedures that will be used to start-up and commission the installed equipment and total system. The schedule also provides for the customer to be notified of and have the right to be present during all commissioning procedures. This schedule should contain a provision for the documentation of the client's attendance at the various tests and acceptance of the ESCO's certification that the tests followed the specified procedures and met or exceed the expected results. Use of manufacturer's start up and performance sheets are required.*

*<The operating parameters should contain any specified parameters for the operation of the installed equipment such as temperature setbacks, equipment run times, load controlling specifications and other conditions for the operation of the equipment.>*

### SCHEDULE I: STANDARDS OF COMFORT

*< Section Overview & Comments: The standards of comfort to be maintained for heating, cooling, lighting levels, hot water temperatures, humidity levels and/or any special conditions for occupied and unoccupied areas of the facility should be explicitly described in this schedule. >*

### SCHEDULE J: ESCO MAINTENANCE RESPONSIBILITIES

*<Section Overview & Comments: A complete description of the ESCO's specific operations and maintenance responsibilities should be included in this schedule along with the time intervals for their performance of the stated O&M activities.>*

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### SCHEDULE K: CUSTOMER'S MAINTENANCE RESPONSIBILITIES

*<Section Overview & Comments: This schedule describes the operations and maintenance responsibilities that may be assigned to facility staff as agreed to by both parties. In some instances it will contain no more than a description of routine O&M currently being performed on existing energy consuming equipment in the facility. In other cases, facility staff may be used to provide some maintenance on the new equipment installed under the performance contract, with the ESCO providing any specialized services as needed.>*

### SCHEDULE L: FACILITY MAINTENANCE CHECKLIST

*<Section Overview & Comments: This checklist is a method by which the ESCO may record and track compliance with operations and maintenance procedures performed by facility personnel. The checklist typically specifies simple list of tasks and the corresponding schedule for the performance of the prescribed procedures. Facility staff will complete the checklist and forward it to the ESCO, usually on a monthly basis. (This checklist is a very useful tool for both the ESCO and Customer to verify that the required maintenance activities are being performed at the scheduled intervals).>*

### SCHEDULE M: ESCO'S TRAINING RESPONSIBILITIES

*<Section Overview & Comments: The description of the ESCO's training program or sessions for facility personnel should be contained in this schedule. The duration and frequency of the specified training should also be included. Any provisions for on-going training, commitments to train newly hired facility personnel, and training with respect to possible future equipment or software upgrades should also be described. Any fees associated with requests for training beyond what the ESCO is contractually bound to provide should also be specified.>*

### SCHEDULE N: GENERAL CONDITIONS

*<Note to Customer: Schedule N: Where applicable, insert standard GENERAL CONDITIONS. Where referenced in Section 1.2, describe which of the paragraphs of the general conditions apply to this contract.>*

### SCHEDULE O: PAYMENT SCHEDULE AND SCHEDULE OF VALUES

*<Section Overview & Comments: This schedule contains the schedule of payments from the Customer to the ESCO based on the level of work completed. This can be structured on an overall %*

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*project completion basis or on a ECM or Building by Building basis. A detailed Schedule of Values should be provided by ECM and by building so that the % completion can be established. The schedule of Values is the total cost (including contingency, overhead and profit markups) of each ECM and related services (i.e. energy audit)>*

### **EXHIBITS**

#### **EXHIBIT I PERFORMANCE BOND**

#### **EXHIBIT II LABOR AND MATERIAL PAYMENT BOND**

*< Section Overview & Comments: Since bonding requirements will vary, ensure that bonds are included as exhibits here, as necessary.>*

#### **EXHIBIT III (i)**

#### **CERTIFICATE OF ACCEPTANCE—TECHNICAL ENERGY AUDIT**

#### **EXHIBIT III (ii) CERTIFICATE OF ACCEPTANCE—INSTALLED EQUIPMENT**

### **APPENDICES**

#### **APPENDIX A: RFP FOR ESCO SOLICITATION**

#### **APPENDIX B: ESCO PROPOSAL**

#### **APPENDIX C: TECHNICAL ENERGY AUDIT**

#### **APPENDIX D: LEASE AGREEMENTS AND DOCUMENTS**

#### **ADDITIONAL OPTIONAL SCHEDULES**

*<The following schedules can be included as optional and included or combined with others or may be contained in the audit report, as desired. If any of the following schedules are used, references to these schedules may need to be added to the contract body.>*

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### **PRE-EXISTING SERVICE CONTRACTS**

*<Information regarding the scope and cost of pre-existing equipment service contracts should be located in this schedule. This gives both the client and ESCO information about how and when the existing equipment is being serviced. As well, if the ESCO is credited with any maintenance savings or is taking over any existing service contracts, the scopes and costs of such Contracts will be useful in tracking the performance of the ESCO in providing the required services and documenting any attributable cost savings.>*

### **ENERGY SAVINGS PROJECTIONS**

*<This schedule should contain the projected energy savings in units for each year of the contract. Oftentimes these projections are broken down on a measure-by-measure basis although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the project, this schedule should contain projections for each facility, even though they may all be covered under a single guarantee.>*

### **PROJECTED FINANCIAL PERFORMANCE**

*<<Section Overview & Comments: This schedule should include, for information purposes only, a spreadsheet depiction of expected financial performance of the project for the entire contract term. It should clearly identify all financial components of the project including interest rates and financing costs to the leasing company, current fuel prices, any escalation rates to be applied (if an escalation rate is going to be agreed upon with the ESCO then it should be clearly documented in Schedule F), guaranteed savings, ESCO compensation figures (up front payment and monitoring fees), cash-flow projections and projected Net Present Value of any cumulative positive cash flow benefits to the building owner.>*

### **FACILITY CHANGES CHECKLIST**

*<A "Facility Changes Checklist" or other method may be provided by the ESCO for the client to notify the ESCO of any changes in the facility that could have an impact on energy consumption (e.g. occupancy, new equipment acquisition, hours of use etc.). This checklist is generally submitted on a monthly basis or quarterly basis.>*

### **CURRENT AND KNOWN CAPITAL PROJECTS AT FACILITY**

*<If there are any current or planned capital projects to be implemented in the facility, that information should be contained in this schedule. This information could prove to be very useful in*

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*the out-years of the contract to avoid potential disputes over long-term energy savings performance, overall facility energy consumption and costs..>*